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(3)

No. 06-1692

FILED
SEP 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

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PAUL KLEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY BRIEF FOR PAUL KLEIN, PETITIONER

DAVID Z. CHESNOFF
Counsel of Record
RICHARD A. SCHONFELD
CHESNOFF & SCHONFELD
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563
Counsel for Petitioner

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ARGUMENT

A. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN UPHOLDING THE WARRANTLESS SEARCH THAT WAS PERFORMED PURSUANT TO A CONDITION OF KLEIN'S ILLEGAL AND VOID SENTENCE

I. PETITIONER IS NOT COLLATERALLY ATTACKING HIS CALIFORNIA CONVICTION

The United States Court of Appeals for the Ninth Circuit upheld the search in this case which was performed as a result of Klein's illegal and void sentence. The Ninth Circuit relied upon the holding in *Custis v. United States*, 511 U.S. 485, 490-97 (1994) and *United States v. Martinez-Martinez*, 295 F.3d 1041, 1044 (9th Cir. 2002) and viewed Klein's motion as a collateral attack on his California conviction. Similarly, the Respondent cites *Custis*, supra, and *Daniels v. United States*, 532 U.S. 374, 382 (2001). All three cases are factually and legally distinguishable from this case. Those cases address the impropriety of collateral attacks on prior convictions that are being utilized for sentencing enhancements. To the contrary, the instant case deals with the fact that Klein's prior conviction could not be utilized as the basis or justification for the illegal and warrantless search performed by the government agents.

Petitioner is litigating the propriety of a search and not the propriety of his California conviction. Had the district court herein agreed that the search was a violation of the Fourth Amendment, because Petitioner was not properly on supervision at the time of the search, the Court would not be entering an order invalidating Klein's prior conviction, it would be entering an order suppressing the evidence.

II. THE PROBATION OFFICER DID NOT HAVE AUTHORITY TO SEARCH PETITIONER'S HOME

The Respondent argues that individuals under the supervision of probation officers have a diminished expectation of privacy and that probation officers need only reasonable suspicion to search a probationer's home. Res. p. 9. The government relies on *Griffin v. Wisconsin*, 438 U.S. 868, 874 (1987) for that notion. However, *Griffin* involved an analysis of the State of Wisconsin's probation system, wherein the Court held that the state probation system presented a special need for the exercise of supervision to assure that probation restrictions are in fact observed. Therein, this Honorable Court specifically analyzed a Wisconsin regulation that provided authority for probation officers to search under a reasonable suspicion standard. In fact this Honorable Court specifically stated that:

> "We think the Wisconsin Supreme Court correctly concluded that this warrantless search did not violate the Fourth Amendment. To

> reach that result, however, we find it unnecessary to embrace a new principle of law, as the Wisconsin court evidently did, that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal "reasonable grounds" standard. As his sentence for the commission of a crime, Griffin was committed to the legal custody of the Wisconsin State Department of Health and Social Services, and thereby made subject to that Department's rules and regulations."

The government also cites *United States v. Knight*, 534 U.S. 112 (2001). Res. p. 9. Therein, this Honorable Court held that when a probationer has a *valid* search clause as a condition of probation, he is not held to the standard of probable cause required under the Fourth Amendment for a search.

Accordingly, that case has no bearing herein, as the search clause was invalid.

Additionally, even under a standard of reasonableness, the officers cannot justify randomly opening drawers that are four to five feet away from Petitioner, based upon their observation of a ceremonial sword in his bedroom.

The government contends that when the probation officers observed the sword in Petitioner's room they had probable cause to believe Petitioner had violated his conditions of supervision. Res. p. 3. They further claim that when "Petitioner furtively looked

around the room as if to see if any other weapons were visible" that gave the officers reasonable suspicion that there might be other weapons. Res. p. 3. The government is both factually and legally incorrect.

Officer Perez testified that when he entered Petitioner's room he saw a sword against the wall between the bed and the nightstand. The officer advised Petitioner that he was not supposed to have any dangerous weapons. The officer secured the sword. The officer asked Petitioner to show him the closet. The officer did not discover anything improper within the closet. At that time the two officers and Mr. Klein were all standing within the bedroom. Officer Perez asked Petitioner if he had any other weapons, and he started looking around and did not respond. Although Klein made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms."

The above described circumstances did not give rise to reasonable suspicion.

The Respondent then erroneously asserts that "even if the search condition had been invalid, however, petitioner would not be entitled to suppression." Res. p. 10. The Respondent bases that assertion on the notion that Petitioner's original sentence of "supervised release" included a condition requiring him to "permit a probation officer to visit him at any time . . . to permit confiscation of any contraband observed in plain view." Res. p. 10-11.

What the Respondent fails to recognize is that the proceedings related to Petitioner's "supervised release" were void. The original sentence of "supervised release" was illegal and the modification was without jurisdiction.[1] Moreover, the officers did not arrest Klein as a result of the sword and therefore had no authority to search further.

III. THE SEARCH OF PETITIONER'S ROOM WAS NOT A SEARCH INCIDENT TO ARREST

Contrary to the government's assertion, Petitioner was not arrested as a result of the sword. Officer Perez testified that he saw the sword and secured it. He did not handcuff Petitioner, he did not advise Petitioner of his rights under *Miranda*, and he did not indicate to Petitioner that we was under arrest. (Officer Fredlund confirmed these facts). In fact, Petitioner was asked to show the officers his

[1] The Respondent erroneously claims that even if the "corrected" sentence of probation was invalid, the original sentence of Supervised Release would permit the officers to be present at Petitioner's home when they encountered the sword and they are permitted to confiscate evidence found in plain view. Res. p. 11. What the Respondent fails to recognize is that in *United States v. Thomas*, 135 F.3d 873 (1998), when the Defendant faced a probation revocation and brought to the Court's attention that the sentence was illegally modified, the Court did not revert back to the original sentence and violate the Defendant. Rather, the Court determined that the probation was illegally imposed and therefore no violation could have occurred.

closet and was asked un-*Mirandized* questions after the seizure of the sword.

Thereafter, although Petitioner made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms." The dresser had several drawers; however, only one was opened at that time. The drawer was approximately four feet away from Petitioner. The officer described the drawer as a "junk drawer." This officer testified that officer Fredlund then opened a drawer to the dresser that was directly by him. Again, that dresser had several drawers and only one was opened at that time. That officer found a loaded gun magazine.

Petitioner was then escorted out of the room and officer Fredlund watched Petitioner. Petitioner was still not under arrest, nor were restraints placed on him. Perez then went back into the bedroom and "conducted a limited search of the area." Petitioner was not in the bedroom at that time. The officer found three different weapons. The weapons were located underneath the bed. Petitioner was *then* placed in restraints.

The government misplaces their focus. The government argues that after the officers opened the drawers and found the gun magazine, Petitioner was escorted out of the room and thereafter a search incident to arrest occurred. What the government fails to recognize is that the search of the drawers and the discovery of the gun magazine is what precipitated

the subsequent search of the bedroom. Accordingly, the first search of the drawers was illegal and cannot be justified as a search incident to arrest, as Petitioner was not being arrested.

The government's reliance upon *Rawlings v. Kentucky*, 448 U.S. 109 (1980) is also misplaced. Therein, the Defendant admitted to being the owner of the large quantity of drugs that the officers seized. The officers then searched the individual and arrested him. This Honorable Court held that the formal arrest followed quickly on the heels of the challenged search and therefore was lawful. *Id.* at 110. The distinction there is that the Defendant was going to be arrested no matter what. They searched him and immediately arrested him. In the instant case, the Petitioner was not going to be arrested. The officers secured the sword, and asked him to show them around the rest of the room, including the closet. Clearly, Petitioner was not under arrest, nor did the officers even imply in their testimony that he would have been arrested. The sole basis for Petitioner's arrest were the weapons found after the officers searched the room. This search was not contemporaneous with the arrest.

Finally, the respondent claims that if this Honorable Court excises the illegally obtained evidence from the search warrant application and only considers the loaded magazine and ammunition, there would still be probable cause. Res. p. 11 fn. 4. The government makes this claim on the premise that the magazine and ammunition were found in a lawful

search incident to arrest. As described above, those items were not found in a valid search incident to arrest.

IV. *UNITED STATES V. THOMAS* IS DIRECTLY APPLICABLE TO THIS CASE

The Respondent ignores the import of *United States v. Thomas*, 135 F.3d 873 (1998) by again relying upon *Knight*, supra. The government fails to recognize that the holding in *Thomas* is not limited to direct challenges of prior convictions. Rather, the Court in *Thomas* provided a detailed analysis of the impropriety of a Court changing a sentence of "supervised release" to one of probation, beyond seven days after the judgment is entered.

CONCLUSION

1. Petitioner's Sentence from the Central District of California was an illegal sentence. Thereafter, the "correction" was entered beyond the authority of the Court. Accordingly, Petitioner was neither on Probation or Supervised Release at the time of the search by Officers Perez and Fredlund;

2. The officers did not search Petitioner's room incident to arrest. A search incident to arrest must occur contemporaneously to the arrest and must be the result of an impending arrest. In the instant case the testimony is clear that Petitioner was not under arrest as a result of the sword, he was not *Mirandized*, and he was not placed in

restraints. It was not until the guns were found as a result of the illegal search that Petitioner was arrested;

The Petitioner's home was illegally searched as a result of a void and illegal sentence. Had Petitioner's case been pending within the United States Court of Appeals for the Second Circuit, the evidence would have been suppressed. Accordingly, there is a split in the Circuits and Certiorari is warranted herein.

Dated this 13th day of September, 2007.

Respectfully submitted,

DAVID Z. CHESNOFF
RICHARD A. SCHONFELD
CHESNOFF & SCHONFELD
520 South Fourth Street
Las Vegas, Nevada 89101
Counsel for Petitioner